

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KIZZY BYARS, et al.,

Plaintiff(s),

v.

WESTERN BEST LLC,

Defendant(s).

Case No. 2:19-CV-1690 JCM (DJA)

ORDER

Presently before the court is defendant Western Best, LLC's motion for summary judgment. (ECF No. 80). Plaintiff Danielle James responded (ECF No. 83) and defendant replied (ECF No. 84). Also before the court is plaintiff's motion to reopen discovery and modify the pretrial scheduling order (ECF No. 83), which has been fully briefed. For the reasons set forth below, the court grants defendant's motion for summary judgment and denies plaintiff's motion to reopen discovery.

I. Procedural Background

This putative class action arises from a variety of alleged workplace violations. (ECF No. 58). The first amended complaint was filed by two plaintiffs and alleged failure to pay overtime wages, waiting time penalties, unpaid meal and rest breaks, hostile work environment, discrimination under state and federal law, tortious constructive discharge, and interference with contractual relations. (ECF 27). Plaintiff Kizzy Byars has since been dismissed from this case, leaving only plaintiff James. (ECF No. 79).

The court ruled on defendant's motion to dismiss plaintiff's first amended complaint, dismissing her Title VII claims, without prejudice, as she failed to allege exhaustion of administrative remedies. (ECF No. 40, at 6). The court also dismissed plaintiff's interference with

1 contractual relations claim for lacking sufficient factual allegations. (*Id.* at 8). Plaintiff then filed
 2 her second amended complaint and alleged exhaustion of administrative remedies but did not
 3 otherwise amend her interference claim. (*See generally* ECF No. 58). Accordingly, all of plaintiff's
 4 claims in her second amended complaint remain to be adjudicated, except for her interference
 5 claim.

6 A scheduling order set discovery from October 5, 2021, to March 24, 2022. (ECF No. 54).
 7 Discovery was extended three times. The first time extended the close of discovery from March
 8 of 2022 to May 23, 2022. (ECF No. 60). Right before the May cut-off date, discovery was
 9 extended for a second time to July 25, 2022. (ECF No. 67). A few days after the extension was
 10 granted, plaintiff's attorney moved to withdraw from the case. (ECF No. 68). The court granted
 11 the motion in July and simultaneously extended discovery for a third time—until September 26,
 12 2022. (ECF No. 75). No further extensions were granted. Plaintiff has not moved to certify this
 13 putative class action.

14 **II. Undisputed Facts**

15 Defendant is a brothel, operating legally in Nye County, known as the “Chicken Ranch.”
 16 (ECF 80, at 1–2). Plaintiff worked as a “courtesan,” or legal prostitute, at the Chicken Ranch for
 17 approximately two years. (*Id.*, at 2). At the beginning of her time at the Chicken Ranch, plaintiff
 18 entered into an “Independent Contractor’s Agreement” with the defendant. (*Id.*).

19 The agreement stipulated that defendant would provide plaintiff with a private room and
 20 access to the Chicken Ranch’s facilities and clientele, plaintiff would negotiate and set her own
 21 prices for services, and plaintiff would pay the Chicken Ranch \$39.00 per day for rent and
 22 bookkeeping as well as 50% of her earned service fees. (ECF No. 81-1, at 1–2).

23 Plaintiff claims she resigned from the Chicken Ranch due to intolerable harassment and
 24 discrimination. (ECF No. 58, at 16). She thereafter filed this putative class action, alleging various
 25 violations of state and federal employment law.

26 **III. Motion to Reopen Discovery**

27 In response to defendant’s motion for summary judgment, plaintiff moves to reopen
 28 discovery. (ECF No. 83). A request to reopen discovery should only be granted if “the movant

1 diligently pursued its previous discovery opportunities and...can show how allowing additional
 2 discovery would...preclude summary judgment.” *Panatronic USA v. AT&T Corp.*, 287 F.3d 840,
 3 846 (9th Cir. 2002) (citations omitted). If the party seeking the modification “was not diligent, the
 4 inquiry should end” and the motion should not be granted. *Johnson v. Mammoth Recreations,*
 5 *Inc.*, 975 F.2d 604, 609(9th Cir. 1992). The Court has broad discretion in supervising the pretrial
 6 phase of litigation. *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th
 7 Cir.2002).

8 Plaintiff argues that good cause exists to reopen discovery because plaintiff was without
 9 counsel from May 2022 to September 2022, and as such, could not conduct discovery or timely
 10 move to extend discovery. (*Id.* at 14–15). Plaintiff provides evidence that she attempted to retain
 11 an attorney after her former counsel’s withdrawal but does not otherwise follow the requirements
 12 of Local Rule 26-3 or cite relevant authority supporting her request to reopen discovery.

13 LR 26-3 requires movants to provide the court with (a) a statement specifying the discovery
 14 completed; (b) a specific description of the discovery that remains to be completed; (c) reasons
 15 why discovery was not completed within the time limits set by the discovery plan, and (d) a
 16 proposed schedule for completing all remaining discovery. By providing none of this information,
 17 plaintiff makes little effort to demonstrate how she has been diligent in discovery.

18 Plaintiff’s former attorney did not withdraw until after the second discovery extension was
 19 granted. By then, discovery had been open for over seven months. Plaintiff provides the court
 20 with no explanation for why discovery was not completed within this time.

21 The Ninth Circuit has admonished that a “scheduling order is not a frivolous piece of paper,
 22 idly entered, which can be cavalierly disregarded by counsel without peril.” *Johnson*, 975 F.2d at
 23 610. Doing so disrupts the “agreed-upon” course of litigation and rewards “the indolent and
 24 cavalier.” *Id.* Plaintiff has not demonstrated good cause to reopen discovery, and her motion must
 25 be denied.

26 ...

27 ...

28 ...

1 **IV. Defendant's motion for summary judgment**

2 **A. Legal Standard**

3 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
4 depositions, answers to interrogatories, and admissions on file, together with the affidavits (if any),
5 show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment
6 as a matter of law." Fed. R. Civ. P. 56(a). Information may be considered at the summary
7 judgment stage if it would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.
8 2003) (citing *Block v. Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001). A principal purpose of
9 summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v.*
10 *Catrett*, 477 U.S. 317, 323–24 (1986).

11 In evaluating evidence at the summary judgment stage, the court does not make credibility
12 determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most
13 favorable to the nonmoving party. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809
14 F.2d 626, 630–31 (9th Cir.1987). The court's function at this stage is not to "determine the truth
15 of the matter but to determine whether there is a genuine issue for trial." *In re Barboza*, 545 F.3d
16 702, 707 (9th Cir. 2008).

17 When the non-moving party bears the burden of proof at trial, the moving party can meet
18 its burden on summary judgment in two ways: (1) by presenting evidence to negate an essential
19 element of the non-moving party's case; or (2) by demonstrating that the non-moving party failed
20 to make a showing sufficient to establish an element essential to that party's case on which that
21 party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If the moving
22 party fails to meet its initial burden, summary judgment must be denied, and the court need not
23 consider the non-moving party's evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
24 60 (1970).

25 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
26 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith*
27 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
28 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient

1 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
2 versions of the truth at trial.” *T.W. Elec. Serv., Inc.*, 809 F.2d at 630.

3 However, the nonmoving party cannot avoid summary judgment by relying solely on
4 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
5 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
6 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
7 for trial. *See Celotex*, 477 U.S. at 324. If the nonmoving party’s evidence is merely colorable or
8 is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby,*
9 *Inc.*, 477 U.S. 242, 249–50 (1986).

10 **B. Discussion**

11 Defendant argues that summary judgment is warranted because plaintiff provides no
12 authenticated evidence that she was defendant’s employee. (ECF No. 80, at 2). The court agrees.
13 Attached to plaintiff’s response to defendant’s motion for summary judgment are four exhibits,
14 none of which are authenticated. “A trial court can only consider admissible evidence in ruling on
15 a motion for summary judgment.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir.2002).
16 Unauthenticated documents cannot be considered on summary judgment because “[a]uthentication
17 is a condition precedent to admissibility.” *Id.* (citations omitted).

18 Authentication requires that the proponent produce evidence that is sufficient to support a
19 finding that the document is what the proponent claims it is. FED. R. EVID. 901(a). Plaintiff must
20 therefore produce a declaration or other appropriate affidavit providing a foundation for the
21 admissibility of her evidence. *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*,
22 812 F. Supp. 2d 1089, 1097–98 (E.D. Cal. 2011). Because defendant has produced sufficient
23 evidence to negate an element of each of plaintiff’s claims, and plaintiff provides no authenticated
24 evidence of her own, she has not met her burden and summary judgment is appropriate.

25 *1. Plaintiff’s State Law Claims*

26 Plaintiff’s first, second, third, sixth, and seventh claims all arise under state law. Claims
27 one, two, and three are based on Chapter 608 of the Nevada Revised Statutes. Chapter 608 covers
28 only employees, not independent contractors. NEV. REV. STAT. § 608.255 (West 2023); *Terry v.*

1 *Sapphire Gentlemen's Club*, 336 P.3d 951, 954 (Nev. 2014). If a plaintiff makes solely statutory
 2 claims, as is the case here, a defendant may prevail on summary judgment by establishing that
 3 plaintiff is an independent contractor under NRS 608.0155. *Myers v. Reno Cab Co., Inc.*, 492 P.3d
 4 545, 554 (Nev. 2021).

5 NRS 608.0155 provides litigants are “conclusively presumed to be an independent
 6 contractor” if they: (a) have a social security number or have “filed an income tax return
 7 for...earnings from self-employment...in the previous year,” (b) are “required by the contract with
 8 the principal to hold any necessary state...or local business license and to maintain any necessary
 9 occupational license, insurance or bonding in order to operate in this State,” and (c) satisfy three
 10 or more other relevant criteria. NEV. REV. STAT. § 608.0155 (West 2023) (emphasis added).

11 The criteria relevant to this discussion are that “the person has control and discretion over
 12 the means and manner of the performance of any work and the result of the work, rather than the
 13 means or manner by which the work is performed;” “the person has control over the time the work
 14 is performed,” other than for an agreement regarding range of work hours; and the person is “not
 15 required to work exclusively for one principal.” NEV. REV. STAT. § 608.0155(1)(c) (West 2023).

16 A “contractual recitation that a worker is not an employee is not conclusive” under Section
 17 608.0155. *Myers*, 492 P.3d at 548. “Instead, the court must determine employee status under the
 18 applicable test, based on *all* relevant facts.” *Id.* at 550 (emphasis added). When the relevant facts
 19 are not in dispute, the question of employment status is one of law and may be resolved by the
 20 court on summary judgment. *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 868 (Nev. 2021).

21 Defendant produces an authenticated agreement, signed by plaintiff, titled “Independent
 22 Contractors Agreement.” (ECF No. 81-1). The agreement stipulates that plaintiff is to file her
 23 own taxes, maintain her own licenses, and furnish her own professional props. (*Id.*). Defendant
 24 agrees not to “control or direct the details, manner or means by which” plaintiff performs her
 25 services. (*Id.*). Defendant also agrees to maintain its own licenses and provide plaintiff with a
 26 private room and access to Chicken Ranch Facilities and clientele in exchange for rent and 50%
 27 of her service fees. (*Id.*).
 28

1 Plaintiff is free to set her own work hours provided that she notifies defendant of her
 2 intended hours, and she may also “contract for similar services with other individuals and other
 3 businesses.” (*Id.*). Plaintiff receives payment from clients and does not receive a salary from
 4 defendant. (*Id.*).

5 In addition to the agreement, plaintiff’s deposition testimony supports a finding that she
 6 was an independent contractor. Plaintiff explains that, while working at the Chicken Ranch, she
 7 paid for and maintained her own licenses. (ECF 81-9, at 6–7). Plaintiff selected her own work
 8 hours and performed services at the Chicken Ranch based on the parties’ *mutual* availability. (*Id.*
 9 at 10). Although defendant required the plaintiff to provide a time estimate of her services to
 10 patrons, plaintiff exclusively controlled how *much* time was involved in the service, what services
 11 to provide, how to provide them, to whom to provide them, and how much she charged for them.
 12 (*Id.* at 22–24). Plaintiff also worked at other legal brothels at the same time that she worked at the
 13 Chicken Ranch. (*Id.* at 11).

14 There is no reasonable dispute that plaintiff was an independent contractor—rather than an
 15 employee—under NRS 608.0155. The Nevada Supreme Court case *Doe Dancer* provides
 16 guidance.¹ This case involved performers at a strip club under analogous circumstances, and the
 17 court found that the performers qualified as employees. 481 P.3d at 863–64. But unlike the
 18 plaintiffs in *Doe Dancer*, plaintiff has not provided the court with authenticated evidence that
 19 defendant established “a framework of false autonomy” by giving her a “coercive choice between
 20 accruing debt to the [house] or redrawing personal boundaries of consent and bodily integrity.”
 21 481 P.3d at 869.

22 The defendant in *Doe Dancer* also exerted control in other ways by dictating the number
 23 of costume changes the plaintiffs were required to undergo, the “specific number of G-strings”
 24 they were required to wear, and the prices plaintiffs charged for dances. *Id.* None of the foregoing
 25 is present in the record of the instant case.

26
 27
 28 ¹ Although *Doe Dancer* was analyzed under the economic realities test, rather than NRS 608.0155,
 its analysis is nonetheless relevant as both tests contemplate the plaintiff’s control over the “means
 and manner” in which work is performed. *See* 481 P.3d at 865.

1 Based solely on defendant's evidence, all requirements of NRS 608.0155 are satisfied.
 2 With no dispute of material fact, the court grants summary judgment in favor of defendant on
 3 plaintiff's first, second, and third claims.

4 Plaintiff's sixth and final state law claim is for discrimination and retaliation under NRS
 5 613.330. The Nevada Supreme Court has explained that Nevada's anti-discrimination statutes are
 6 almost "identical" to Title VII, and courts may look to federal law for guidance. *E.g., Pope v.*
 7 *Motel 6*, 114 P.3d 277, 280 (Nev. 2005), *Complete Care Med. Ctr. v. Beckstead*, 466 P.3d 538,
 8 2020 WL 3603881, at *1 (Nev. 2020).

9 Due to their similarity, "courts apply the same analysis" under both. *Complete Care Med.*
 10 *Ctr.*, 2020 WL 3603881, at *1. As plaintiff also alleges Title VII claims, the court addresses
 11 plaintiff's sixth claim further below, alongside the court's analysis of plaintiff's federal claims.

12 Plaintiff's seventh claim is for tortious constructive discharge. This tort-based cause of
 13 action allows a plaintiff to sue her at-will employer when her discharge "violates public policy."
 14 *Russo v. Shac, LLC*, 498 P.3d 1289 (Nev. Ct. App. 2021). A prerequisite for this claim is that the
 15 plaintiff demonstrate that "she lacks an adequate statutory remedy" for her discharge, as it would
 16 be unfair to allow her an additional tort remedy under such circumstances. *Id.*; *Ozawa v. Vision*
 17 *Airlines, Inc.*, 216 P.3d 788, 791 (Nev. 2009).

18 Plaintiff brings claims under NRS 613.330 and Title VII based on the same underlying
 19 facts as her constructive discharge claim. Plaintiff therefore has alternative statutory remedies that
 20 even she is aware of. Plaintiff cannot attempt to take two bites at the apple. Summary judgment
 21 is granted in favor of defendant on plaintiff's seventh claim.

22 2. Plaintiff's Federal Claims

23 Plaintiff alleges two Title VII claims: (1) hostile work environment, and (2) discrimination
 24 and retaliation. (ECF No. 58). A prerequisite to both of these claims is an employer-employee
 25 relationship. *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999) ("Title VII protects
 26 employees, but does not protect independent contractors."). In determining whether a person is an
 27 employee under Title VII, the court evaluates "the hiring party's right to control the manner and
 28

1 means by which the product is accomplished.” *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943,
 2 945 (9th Cir. 2010). The relevant factors under this evaluation are:

3 “(1) the skill required; (2) the source of the instrumentalities and
 4 tools; (3) the location of the work; (4) the duration of the relationship
 5 between the parties; (5) whether the hiring party has the right to
 6 assign additional projects to the hired party; (6) the extent of the
 7 hired party's discretion over when and how long to work; (7) the
 8 method of payment; (8) the hired party's role in hiring and paying
 9 assistants; (9) whether the work is part of the regular business of the
 10 hiring party; (10) whether the hiring party is in business; (11) the
 11 provision of employee benefits; and (12) the tax treatment of the
 12 hired party.”

13 *Id.*

14 In *Murray*, the Ninth Circuit classified the plaintiff as an independent contractor, primarily
 15 because she was free to conduct her business as she saw fit “without day-to-day intrusions.” *Id.* at
 16 946. The Ninth Circuit cited as supporting evidence the fact that plaintiff scheduled her own time
 17 off, was paid only commissions, reported herself as self-employed to the IRS, and sold products
 18 other than those offered by the defendant “in limited circumstances.” *Id.* Even though the plaintiff
 19 had a “long-term” relationship with the defendant and was subject to “some minimum standards,”
 20 these were “insufficient to overcome the strong indications” that she was an independent
 21 contractor. *Id.*

22 The undisputed facts of the present case are similar. Although plaintiff was subject to some
 23 minimum standards set by defendant (such as providing time estimates), she was otherwise free to
 24 perform her services without intrusion. She was paid by patrons based on the prices she dictated,
 25 for the services she negotiated. She was free to set her own hours at the Chicken Ranch. She was
 26 free to—and did—work at other brothels. The parties’ agreement also stipulated that she would
 27 file her own taxes as self-employed.

28 Based upon the record before the court and *Murray*, the court finds that plaintiff was an
 independent contract for purposes of Title VII and NRS 613.330. Summary judgment is granted
 in favor of defendant on plaintiff’s fourth, fifth, and sixth claims.

Finally, plaintiff argues that she is an employee under the “economic realities” test, which
 is the test federal courts employ when determining whether a person is an employee under the Fair

1 Labor Standards Act (“FLSA”). *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 909 (9th
2 Cir. 2019).

3 Plaintiff makes an alternative claim for overtime wages under the FLSA in her second
4 amended complaint. (ECF No. 58, at ¶ 89). Under the economic realities test, a person is classified
5 as an employee for FLSA purposes if they are, “as a matter of economic reality...dependent upon
6 the business to which they render service.” *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d
7 748, 754 (9th Cir. 1979).

8 Under this test, to distinguish between independent contractors and employees, courts may
9 consider a number of factors, including: the degree of defendant’s right to control the manner in
10 which the work is to be performed; plaintiff’s “opportunity to profit or loss” depending on her
11 “managerial skill;” plaintiff’s “investiture in equipment or materials required” for her work;
12 “whether the service rendered requires a special skill;” “degree of permanence in the working
13 relationship;” and “whether the service rendered is an integral part of the alleged employer’s
14 business.” *Id.* “The presence of any individual factor is not dispositive of whether an
15 employee/employer relationship exists,” rather, the court must consider the “circumstances of the
16 whole activity.” *Id.*

17 There is no genuine dispute of fact that plaintiff was an employee under the FLSA. The
18 reasons supporting the court’s finding that plaintiff was an independent contractor under her other
19 claims also apply here, and the court need not reiterate them. But the court will highlight an
20 important factor present in this analysis, not present in the others.

21 Defendant has provided evidence that plaintiff’s opportunity for profit depended on her
22 own managerial skills. Plaintiff could—and did—work for other brothels. Plaintiff negotiated her
23 own prices. Plaintiff could also promote herself online, thereby attracting more patrons, so long
24 as she did not advertise her services outside of Nevada. (ECF No. 81-9 at 36). Plaintiff could
25 therefore book more clients, work more hours, and earn more profit, based upon her ability to
26 manage not only her time, but also herself. The court grants summary judgment in favor of
27 defendant on this final claim.

28 . . .

Accordingly,

IT IS FURTHER ORDERED that defendant's motion for summary judgment (ECF No. 80) is GRANTED.

DATED October 16, 2023.

James C. Mahan
UNITED STATES DISTRICT JUDGE